

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

OSCAR JACQUES ORTIZ,
Appellant.

No. 2 CA-CR 2013-0507
Filed August 26, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20112279001

The Honorable Christopher Browning, Judge

AFFIRMED IN PART AS CORRECTED; VACATED IN PART

COUNSEL

Barton & Storts, P.C., Tucson
By Brick P. Storts, III
Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Miller and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 After a jury trial, appellant Oscar Ortiz was convicted of six counts of aggravated driving under the influence of an intoxicant (DUI), specifically: DUI with a suspended license, A.R.S. §§ 28-1381(A)(1), 28-1383(A)(1); ¹ driving with a blood alcohol concentration (BAC) at or above .08 with a suspended license, §§ 28-1381(A)(2), 28-1383(A)(1); DUI with at least two prior DUI violations within eighty-four months, §§ 28-1381(A)(1), 28-1383(A)(2); driving with a BAC at or above .08 with at least two prior DUI violations within eighty-four months, §§ 28-1381(A)(2), 28-1383(A)(2); DUI while a minor is present, §§ 28-1381(A)(1), 28-1383(A)(3)(a); and driving with a BAC of .15 or more but less than .20 while a minor is present, A.R.S. §§ 28-1382(A)(1), 28-1383(A)(3)(b). He was sentenced to concurrent, presumptive, enhanced prison terms for each offense, the longest of which were ten years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting he has reviewed the record but found no arguable issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he has provided “a detailed factual and procedural history of the case with citations to the record” and asks

¹Throughout this decision we cite the versions of the statutes in effect in June 2011, at the time of Ortiz’s offenses, except where we expressly refer to another version. See 2010 Ariz. Sess. Laws, ch. 194, § 2 (A.R.S. § 13-703); 2009 Ariz. Sess. Laws, ch. 124, § 1 (§ 28-1381); 2008 Ariz. Sess. Laws, ch. 301, § 10 (A.R.S. § 13-105), ch. 286, § 15 (§ 28-1383), § 13 (A.R.S. § 28-1382), and ch. 256, § 19 (§ 28-1382).

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this court to search the record for fundamental error. Ortiz has not filed a supplemental brief.

¶3 Viewing the evidence in the light most favorable to sustaining the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), we find it sufficient to support Ortiz's convictions. Following a traffic stop, Ortiz, who had been driving with his twelve-year-old son in the vehicle, demonstrated numerous signs of intoxication during field sobriety tests. Testing of blood drawn at the scene showed Ortiz had a BAC of .182. The evidence also showed his driver license was suspended at the time of the June 2011 incident and that he had previous DUI violations in January 2006 and August 2004. Sufficient evidence also supports the trial court's finding that Ortiz has at least two historical prior felony convictions. *See* A.R.S. § 13-105(22).

¶4 Ortiz's prison terms are within the statutory limit and were imposed properly.² *See* A.R.S. §§ 13-703(C), (J), 28-1383(L). The sentencing minute entry, however, provides that the "fines, fees, [and] assessments" the trial court had imposed were reduced to a Criminal Restitution Order (CRO). When Ortiz was sentenced in May 2012, A.R.S. § 13-805 did not permit the entry of a CRO at sentencing. *See* 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. Under these circumstances, "the imposition of a CRO before the

² The sentencing minute entry states that the trial court sentenced Ortiz as a category two repetitive offender based on his having at least three "Non-Historical Prior Felony Convictions." *See* § 13-105(22)(d) (including "[a]ny felony conviction that is a third or more prior felony conviction" in definition of "[h]istorical prior felony conviction"). But, at sentencing, the parties correctly agreed that Ortiz should be sentenced as a category three repetitive offender based on his having four prior felony convictions, and Ortiz's sentences reflect that determination. We therefore correct the sentencing minute entry to show that Ortiz was sentenced as a category three repetitive offender. *See State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983) (holding "oral pronouncement of sentence controls" over sentencing minute entry).

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defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'"³ *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

¶5 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and found none except the improper entry of the CRO. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (stating *Anders* requires court to search record for fundamental error). The CRO is therefore vacated. We otherwise affirm Ortiz's convictions and sentences as corrected.

³The statute has since been amended to permit the entry of a CRO for restitution at sentencing. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; *State v. Cota*, 234 Ariz. 180, ¶¶ 14-16, 319 P.3d 242, 246-47 (App. 2014).